

CAUSE NO. GV500657

THE STATE OF TEXAS,

Plaintiff,

v.

VONAGE HOLDINGS CORPORATION

Defendant,

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

200th JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff the STATE OF TEXAS, acting by and through the Attorney General of Texas, GREG ABBOTT, complains of Defendant, VONAGE HOLDINGS CORPORATION ("Vonage"), and for cause of action would respectfully show the Court the following:

I.

DISCOVERY CONTROL PLAN

1.1 Discovery is intended to be conducted under Level 2 pursuant to Tex. R. Civ. P. 190.3.

II.

JURISDICTION

2.1 Greg Abbott, Attorney General of Texas, through his Consumer Protection and Public Health Division, in the name of the State of Texas, brings this action under the authority granted to him by section 17.47 of the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), TEX. BUS. & COM. CODE § 17.47 *et seq.* (Vernon 2002 & Supp. 2005):

FILED

05 MAR 22 AM 8:00

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Amari Rodriguez-Ramirez
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

III.
DEFENDANT

3.1 Defendant Vonage is a privately held foreign corporation with its principal place of business at 2147 Route 27, Edison, New Jersey 08817. Defendant Vonage engages in business in the State of Texas but does not maintain a regular place of business in this state nor has Defendant designated an agent for service of process. This suit arises out of Defendant's business in this state as more specifically described below. Pursuant to Texas Civil Practices & Remedies Code § 17.044, Defendant can be served by certified mail, return receipt requested, directed to Defendant through the Texas Secretary of State as an agent for service of process at the following address: Citations Section, Room 214, 1019 Brazos, Austin, Texas 78701.

IV.
VENUE

- 4.1 Venue for this cause of action lies in Travis County, Texas, for the following reasons:
- A. Under § 15.001 of the Tex. Civ. Prac. & Rem. Code, venue is proper because a substantial part of the violations are alleged to have occurred in the county of suit; and
 - B. Under § 17.47(b) of the DTPA, venue is proper because Defendant has done business in the county of suit.

V.
PUBLIC INTEREST

5.1 Because Plaintiff STATE OF TEXAS has reason to believe that Defendant has engaged in, and will continue to engage in the unlawful practices set forth below, Plaintiff STATE OF TEXAS has reason to believe that Defendant has caused, and will continue to cause damage to

residents of the State of Texas and cause adverse effects to legitimate business enterprises that conduct their trade and commerce in a lawful manner in this State. Therefore, the Consumer Protection and Public Health Division of the Office of the Attorney General of Texas believes and is of the opinion that these proceedings are in the public interest.

**VI.
TRADE AND COMMERCE**

6.1 Defendant is engaged in trade and commerce as that term is defined by § 17.45(6) of the DTPA.

**VII.
ACTS OF AGENTS**

7.1 Whenever in this Petition it is alleged that Defendant did any act, it is meant that:

- A. Defendant performed or participated in the act; or
- B. Defendant's officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendant.

**VIII.
VOICE OVER INTERNET AND THE 9-1-1 EMERGENCY RESPONSE SYSTEM**

8.1 In the mid 1990s, hobbyists began to recognize the potential to send voice communications using data packets over the Internet as an alternative to communicating through standard telephone service. Around 1995, the first Voice over Internet Protocol (VoIP) software emerged, which allowed two computer users who had installed the software on their computers to talk to each other over the Internet with the use of a microphone. Subsequent software improvements made it possible for Internet phone devices to dial regular telephones. Since 2000, VoIP usage and quality has expanded and improved dramatically. VoIP service, as an alternative

to standard telephone service, is now commercially available to residential users who have broadband (high speed Internet) connections.

8.2 Consumers who have VoIP service are able to make telephone calls over the Internet.¹ When placing a VoIP call using a phone with an analog to digital adapter, the consumer hears a dial tone and is able to dial just as he or she would when using standard telephone service. VoIP service may also allow consumers to place calls directly from their computer using a microphone, Internet phone, or a conventional telephone.

8.3 VoIP service is similar to standard telephone service in many ways, but is different in other respects. For example, VoIP service can provide features familiar to consumers such as Dial Tone, Voicemail, Caller ID, Call Waiting, and Call Forwarding. As a result of its transmission over the Internet, VoIP service is not bound to a particular local calling scope as is the case with traditional telephone service. Consequently, VoIP customers are able to select an area code outside of their region, so that for example, an Austin, Texas consumer could choose to have a New York area code. Customers can also take their phone adapters with them when traveling, connect to a broadband Internet connection (for example a hotel's broadband wireless network), and use a traditional phone just as if they were at their home location. Generally, VoIP service offers consumers certain cost advantages because a consumer need not maintain and pay the additional cost for a telephone line just to make telephone calls and some VoIP service plans allow consumers unlimited long distance calling in North America. Also, because VoIP providers are not regulated as telecommunications carriers, consumers' VoIP service bills do not include line items for the types

¹ Essentially, VoIP services convert the voice signal from the consumer's telephone into packets that travel over the Internet. It then converts it back at the other end so that the consumer can speak to anyone with a regular phone number.

of fees which telecommunication carriers generally pass on to consumers.

8.4 The disadvantages of VoIP service include: (a) some VoIP services do not work during power outages and the service provider may not offer backup power; (b) some VoIP services do not include access to the 9-1-1 emergency network; and (c) some VoIP services offer a feature which they call "911" and this feature does not include the full service which consumers in Texas are accustomed to receiving when they dial 9-1-1 using traditional telephone service.

8.5 In Texas when a person dials 9-1-1 using traditional telephone service, that call is sent to a 9-1-1 selective router switch, which directs the call to the appropriate local Public Safety Answering Point (PSAP), and the call is answered by a trained emergency 9-1-1 operator. The router switch also provides the PSAP with the Automatic Number Identification (ANI) associated with that wire line, which is the phone number from which the individual is calling. That ANI is then automatically sent by the PSAP to be checked against another database to retrieve the address associated with that ANI. As a result, an emergency 9-1-1 operator is immediately provided with the phone number and location of the individual placing the emergency phone call and is not dependent on the caller's ability to provide a location. The 9-1-1 system also has multiple redundancy features which function as a safety net to provide an additional level of survivability in life and death emergencies. For example, in the event the call is disconnected, the emergency operator has the number of the caller and can call back or if, for any reason, the PSAP is not available, the call is automatically routed to a predesignated back-up PSAP.

IX. STATEMENT OF FACTS

9.1 Defendant Vonage is currently the largest VoIP provider in the country, with over

500,000 subscribers, including subscribers in Texas. It advertises its VoIP services extensively through print and television commercials, web advertisements placed on popular websites such as MSN Hotmail, brochures that are placed in major retail stores like Best Buy and Circuit City, and at its website, www.vonage.com.

9.2 Defendant Vonage also markets its product through third parties, which sell the service under their own unique brand. For example, EarthLink advertises its VoIP service via the website www.unlimitedvoice.com. That website is virtually identical to Vonage's own site and consumers who sign up for EarthLink's service online must agree to the "Vonage Terms of Service."

9.3 Defendant markets its VoIP service as a "replacement" for traditional telephone service and specifically represents to consumers that "Vonage works just like the telephone service you have in your home today"; that its VoIP service is "an all inclusive home phone service that replaces your current phone company..."; and that "this is like the home phone service you have today - only better."

9.4 Defendant's advertisement and promotional materials include clear and conspicuous descriptions of features available through its VoIP service including Voicemail, Caller ID, Call Waiting, Call Forwarding, Call Transfer, Call Hunt, Repeat Dialing, Caller ID Block, and Call Return.

9.5 Defendant's advertisements also emphasize the cost savings available to consumers who sign up for its service. Defendant's television commercials, for example, use the slogan, "People do stupid things. Like pay too much for their phone service" and go on to suggest that consumers "switch to Vonage." One of Defendant's brochures lists prices for "calling plans" and encourages consumers to "replace your current phone company with Vonage and start saving today!"

9.6 Defendant's representations that its VoIP services replace traditional phone service are misleading, false and confusing because in fact, the "911" feature of its service is vastly different from the traditional 9-1-1 service which consumers in Texas enjoy and rely upon.

9.7 First, when a consumer using Defendant's VoIP service dials the digits 9-1-1 on his or her telephone, that call is not immediately directed to the appropriate local Public Safety Answering Point (PSAP) through the local 9-1-1 network because Defendant does not have interconnection agreements with incumbent telephone companies and has not contracted with other entities who have such agreements. Thus, a consumer's emergency call is routed by a private third party to the closest PSAP through the PSAP's administrative line. These administrative lines are regular business lines which have the lowest answering priority at these emergency call centers. In some locations, these administrative lines are not answered outside of regular business hours. In other locations, these administrative lines are answered by an Interactive Voice Response System which informs callers that if they have an emergency, they should call 9-1-1. Further, when the call is routed to the PSAP, the operator who answers will not know the telephone number and location of the caller. Therefore, if the caller cannot provide the address from which he or she is calling or if the call is disconnected, no emergency assistance will be sent. Finally, emergency calls made using Defendant's VoIP service will generally be routed to the PSAP which is geographically nearest to the address provided by the consumer rather than to the 9-1-1 network designated PSAP for the caller's address and this may cause further delay.

9.8 Second, unlike traditional telephone service, the "911" feature of Defendant's VoIP service is not automatic. Instead, after a consumer purchases and installs Defendant's system, he or she must separately activate Defendant's "911" feature by completing an online form and providing

a home address. Defendant then activates the service, and sends the consumer a confirming e-mail of notification that the consumer's "911 dialing" has been activated. The activation period is expected to take at least 48 hours. If a consumer fails to separately apply for Defendant's "911" feature and then dials the numbers 9-1-1, he or she will reach a recording which informs the caller that 9-1-1 is not available and that no emergency personnel will be dispatched. In addition, if a consumer moves or relocates, he or she must provide new address information to Defendant's network, otherwise when that consumer dials the numbers 9-1-1, that call will be routed to the PSAP associated with the consumer's old address.

9.9 Third, Defendant's VoIP service and access to its "911" feature is dependent upon several factors that are generally not an issue with a standard telephone line. For example, traditional telephone service is powered directly by the telephone company through the telephone line. This system includes a backup for electrical outages so that when the electricity goes out, the telephone service is still operational. Defendant's VoIP service does not have a backup and is therefore more susceptible to an electrical power outage. VoIP service is also dependent upon a continuous broadband connection, making it susceptible to hardware and software malfunctions and traditional Internet restrictions such as network congestion. Similarly, Defendant's VoIP system is subject to Internet hackers and viruses that may result in a disruption in service. And unlike traditional telephone service in which carriers are required to provide consumers with notice prior to disconnection, no such notice requirement applies to VoIP service. Each of these disruptions or disconnections would also result in an inability to dial 9-1-1.

9.10 Fourth, one of the unique benefits to consumers in purchasing Defendant's VoIP service, as advertised by Defendant, is the ability to take the VoIP phone anywhere that has a

broadband Internet connection. Defendant fails to clearly and conspicuously disclose, however, that if an individual dials 9-1-1 using his or her VoIP phone at a location other than home, the call will be routed to the appropriate PSAP based upon the address information that Vonage has stored in its network - not the customer's actual physical location. As a result, the individual's call will be routed to the wrong PSAP to provide emergency assistance.

9.11 Defendant does not clearly and conspicuously disclose to consumers these very significant differences between its "911" feature and traditional 9-1-1 service. At retail outlets, Defendant's materials are silent with respect to the 9-1-1 capabilities of its service. Consumers who sign up for Defendant's service via the telephone receive no information regarding the "911" feature provided with Defendant's VoIP service or regarding its limitations.

9.12 At its website, Defendant makes the unqualified representation that "911 dialing" is one of the "Great Benefits" of its VoIP service. Only if a consumer clicks on the "911 dialing" link are some of the limitations regarding Defendant's service described, however many consumers may not think to click on the link because they assume that they understand what "911 Dialing" means and that Defendant's service includes traditional 9-1-1 service. A similar description of Defendant's "911 dialing" is also included in the user's manual that comes with the phone adapter necessary to use Defendant's VoIP service. These limited explanations fail to adequately disclose all of the differences between Defendant's "911" feature and traditional 9-1-1 service, and the significant consequences of those differences.

9.13 The only other place that Defendant makes any disclosures regarding its limited "911" feature is in its "Terms of Service." However, in these terms, Defendant fails to clearly and conspicuously disclose limitations of its "911" feature. At Defendant's website, for example, the

terms of service, which consist of approximately 1100 lines of text, are displayed in a box that only reveals 10 lines of text at a time, thus requiring consumers to scroll through approximately 110 pages of text in order to review the full terms applicable to their purchase. The disclosures regarding 9-1-1 service are placed in the middle of all other terms and conditions, in the same font size, style, and type as is used with every other disclosure in the agreement. Similarly, the terms of service that accompany the equipment consist of six full sheets of small print disclosures, again with the 9-1-1 disclosures placed in the middle of all other terms and conditions.

9.14 Moreover, contrary to Defendant's marketing of its service as a replacement to traditional telephone service, the terms of service claim that Defendant's service is "not a telephone service" and suggest that a consumer should maintain alternative means to access 9-1-1. In essence, Defendant's disclosures (to the extent that they exist now) miss the mark and fail to disclose to consumers the most important message - if they replace their telephone with Defendant's VoIP service, there exists the very real possibility that in an emergency situation they will be unable to quickly and adequately reach emergency personnel as they would if they had kept their traditional telephone service.

X.

TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT VIOLATIONS

10.1 Sections 1.1 through 9.14 are incorporated herein by reference.

10.2 Defendants, as alleged above and detailed below, have in the course of trade and commerce engaged in false, misleading, or deceptive acts and practices declared unlawful in §§ 17.46(a) and (b) of the DTPA. Such acts include but are not limited to:

A. Engaging in false, misleading or deceptive acts or practices in the conduct of trade

or commerce, in violation of § 17.46(a) of the DTPA;

- B. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have, in violation of § 17.46(b)(5) of the DTPA;
- C. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another, in violation of § 17.46(b)(7) of the DTPA;
- D. Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law in violation of § 17.46(b)(12) of the DTPA; and
- E. Failing to disclose information concerning goods or services which was known at the time of the transaction in order to induce a consumer into a transaction into which the consumer would not have otherwise entered, in violation of § 17.46(b)(24).

XI. PRAYER

11.1 Because Defendant has engaged in the unlawful acts and practices described above, Defendant has violated and will continue to violate the law as alleged in this Petition. Unless enjoined by this Honorable Court, Defendant will continue to violate the laws of the STATE OF TEXAS and cause injury, loss, and damage to the STATE OF TEXAS and to the general public.

11.2 WHEREFORE, Plaintiff prays that Defendant be cited according to law to appear and answer herein; and upon notice and hearing TEMPORARY and PERMANENT INJUNCTIONS be issued, restraining and enjoining Defendant, Defendant's agents, servants, employees and attorneys and any

other person in active concert or participation with any Defendant from engaging in practices declared unlawful by § 17.46 of the DTPA, including but not limited to:

- A. Making unqualified representations that Defendant offers “911 dialing,” “911 service” or words of similar effect in geographic areas in which Defendant does not have access to the 9-1-1 network;
- B. Misrepresenting the characteristics, benefits, or quality of Defendant’s VoIP service;
- C. Failing to clearly and conspicuously disclose that a customer must take affirmative action to activate the consumer’s account capability to dial 9-1-1 and reach a PSAP;
- D. Failing to clearly and conspicuously disclose all of the differences between Defendant’s “911” feature and traditional 9-1-1 service available from traditional wireline telephone service; and
- E. Failing at each point of sale to obtain verification from the purchaser that he or she has received information disclosing the differences between Defendant’s “911” feature and traditional 9-1-1 service and has received information regarding what he or she must do to activate Defendant’s “911” feature.

11.3 In addition, Plaintiff STATE OF TEXAS respectfully prays that this Court:

- A. Adjudge against Defendant civil penalties in favor of Plaintiff STATE OF TEXAS in the amount of Twenty Thousand and No/100 Dollars (\$20,000.00) for each violation of the DTPA, pursuant to § 17.47(c) of the DTPA;

- B. Make such additional orders and judgments against Defendant as are necessary to compensate identifiable persons, to restore money that may have been acquired by unlawful means;
- C. Order Defendant to pay Plaintiff STATE OF TEXAS attorneys' fees and costs of court pursuant to the TEX. GOV'T CODE ANN. § 402.006(c) (Vernon 1998);
- D. Order that all fines, civil penalties, or forfeitures payable to and for the benefit of the Plaintiff STATE OF TEXAS are not dischargeable under bankruptcy pursuant to 11 U.S.C. § 523 (a) (7); and
- E. Grant all other relief to which the Plaintiff STATE OF TEXAS may show itself entitled.

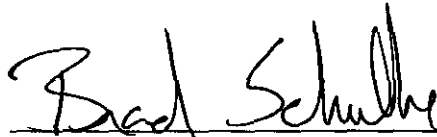
Respectfully submitted,

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